United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: February 17, 2005

TO : William M. Pate, Acting Regional Director
Region 21

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: United Nurses Associations of
California/Union of Health Care Professionals,
NUHHCE, AFSCME (Sharp HealthCare)
Case 21-CB-13798 530-6067-6001-3750

The Region submitted this case for advice on whether the Union violated Section 8(a)(5) by refusing to provide the Employer with bargaining notes that the Employer asserts are relevant to its consideration of a grievance and its preparation for arbitration.

We conclude that the Union's bargaining notes are not relevant for the statutory purpose of grievance processing because the Employer had already agreed to proceed to arbitration before it requested the information. Further, although in certain circumstances bargaining notes may be relevant for contract administration, the Employer is not seeking the notes to shed light on the interpretation of contract language. Rather, the Employer admits that it seeks the notes to confirm its belief that they contain no evidence of any agreement relating to what the disputed contract language means. Finally, a request for bargaining notes raises serious questions of confidentiality for parties involved in a collective-bargaining relationship. Since this particular request for the notes is neither relevant to nor being sought for a statutory purpose, and otherwise raises confidentiality issues, the Region should dismiss this charge, absent withdrawal.

FACTS

San Diego Hospital Association, d/b/a Sharp HealthCare (the Employer) operates a system of integrated acute care hospital facilities throughout San Diego County. United Nurses Associations of California/Union of Health Care Professionals, NUHHCE, AFSCME (the Union) represents the Employer's registered nurses. The Union and Employer recently negotiated for a successor contract. The Union ratified the contract on June 10, 2004, but a dispute arose as to the timing of the wage increases provided for in the agreement. As a result, the Employer refused to sign the contract and the Union filed a charge in Case 21-CA-36484.

Before the investigation of that case was completed, the parties reached a settlement that called for the parties to execute the contract and for the Union to file a grievance over the "wage increase timing dispute."

The parties executed the contract, effective by its terms from execution through June 30, 2007. The Union filed a grievance alleging that the contract calls for the actual payment of across-the-board wage increases on October 1, 2005 and October 1, 2006, and that the Employer had made clear that it would not provide these scheduled wage increases. In that regard, contract Appendix A includes a chart which shows wage schedules for clinical nurses and advanced clinicians that progress through steps 1-15, based on nursing experience that is calculated from the date of the employee's nursing degree. The steps with their respective pay levels are printed horizontally across the page. In vertical columns under each individual step, the chart sets forth a new wage rate scheduled for that step on the contract anniversary dates of October 1, 2005, and October 1, 2006. While the step wage rates are increased on the October dates indicated in the contract, the Employer claims that those increases only go into effect for each employee on the employee's anniversary date. The grievance is currently pending an arbitration hearing.

In connection with the Union's grievance, the Employer, by letter dated September 23, 2004, requested that the Union provide, among other things:

> 1. All bargaining notes taken by any member of the Union's bargaining committee (including but not limited to Ken Deitz, Bill Rouse, Becky Motlagh and/or Barbara Dent) during the course of collective bargaining negotiations in 2004 that record, refer to, or relate in any manner to the parties' negotiations concerning wages and/or the experience-based wage structure ultimately included as part of Appendix A to the 2004-2007 Agreement.

The Union has refused to provide the requested bargaining notes claiming that they are confidential.

The Employer asserts that the requested bargaining notes are relevant to testing the Union's contention that the Employer agreed to the across-the-board wage increases on October 1, 2005 and October 1, 2006. The Employer specifically asserts that if, in fact, it had agreed to grant the increases on an across-the-board basis as contended by the Union, the Union's bargaining notes would

reflect such an agreement. The Employer therefore seeks the notes to establish the absence of its agreement to what the Union asserts the disputed contract language means.

ACTION

The bargaining notes are not relevant for grievance processing because, as a condition of executing the extant contract, the Employer had already decided to arbitrate this grievance. The Employer's request also does not seek the notes for the statutory purpose of contract administration/interpretation. The Employer rather merely seeks to prove that the notes will not contain evidence of the Employer's actual agreement to an across-the-board wage increase. Since the compelled disclosure of the Union's bargaining notes under Section 8(b)(3) otherwise presents serious confidentiality issues, the Region should dismiss this charge, absent withdrawal.

It is well settled that a Union has a statutory duty to supply information that parallels that of an Employer.[1] A party is obligated to provide requested information that may prove relevant to contract negotiation and contract administration, including determinations of whether to file a grievance, whether to proceed to arbitration, and what position to take once a grievance has been filed.[2] While bargaining notes are generally considered relevant when used as evidence in Board unfair labor practice litigation[3] and in contract interpretation litigation in other forums,[4] the Board has never held that either an employer or a union is required to provide such notes under their respective bargaining obligations under Sections 8(a)(5) or 8(b)(3).[5]

---

[1] Firemen & Oilers Local 288 (Diversy Wynandotte), 302 NLRB 1008, 1009 (1991); Jamaica Hospital, 297 NLRB 1001, 1003 (1990); Northern Air Freight, 283 NLRB 922 (1987).

[2] Jamaica Hospital, 297 NLRB at 1002.

[3] See, e.g., Northwest Graphics, Inc., 343 NLRB No. 16, slip op. at 3, 5 (2004), AMF Trucking & Warehousing Inc., 342 NLRB No. 116, slip op. at 5 (2004).

[4] See, e.g., Fox v. Massey-Ferguson, Inc., 172 F.R.D. 653, 678 (E.D. Mich. 1995), affd. 91 F.3d 143 (6th 1996).

[5] Cf. Morton International Inc., GR 7-CA-33999, JD-158-93, 1993 WL 1609483 (in absence of exceptions, ALJ found Employer's bargaining notes relevant to the extent they related to its defense to a grievance, i.e. union waiver of its right to bargain over change Employer announced during contract negotiations, and required limited disclosure of a

Lastly, under Detroit Edison v. NLRB,[6] a party's interest in arguably relevant information may not predominate when the other party asserts a legitimate and substantial interest in maintaining confidentiality.

In this case, the Union's bargaining notes are not relevant to the Employer's processing of the "wage increase timing dispute" grievance because the Employer had already agreed to resolve the "wage increase timing dispute" in arbitration. In fact, the parties had decided to place this issue before an arbitrator prior to the Employer's information request.

Furthermore, the Employer is not seeking the bargaining notes for the statutory purpose of contract language interpretation. Rather, the Employer is seeking the notes to confirm that they contain no evidence showing that the Employer actually agreed to more than what it understands the disputed contract language means, i.e., anniversary date wage increases. Since the Employer is not seeking the notes for contract interpretation, and the notes are not relevant for any other statutory purpose, the Employer's request for the notes appears to be directed at unprivileged pre-arbitral discovery, a function not within the scope of the duty to bargain.[7]

The Employer may also have requested the Union's bargaining notes on the belief that the notes will help the Employer to convince the Union of the strength of the Employer's position. However, the Union need not provide the Employer with these notes to accomplish that result. The Union can simply examine its own notes to see if they support the Employer's position.[8]

We also note that the parties have already decided that an arbitrator should resolve the contract language dispute

---

portion of those notes under Section 8(a)(5); to accommodate Employer's confidentiality interest, ALJ only ordered disclosure of notes of a "strictly factual nature" regarding whether it mentioned the change and any discussion relevant to its waiver defense, but not notes containing, among other things, "bargaining strategy and tactics").

[6] 440 U.S. 301, 318 (1979).

[7] See, e.g., California Nurses Assn., 326 NLRB 1362 (1998), and cases cited therein.

[8] Armstrong Air Conditioning, 8-CA-34846, Advice memorandum dated January 21, 2005.

and, as a practical matter, this related dispute over the Employer's information request easily can be handled in that arbitration. The Employer may subpoena the bargaining notes at the arbitration. If the Employer is correct and the notes are devoid of any substantive evidence regarding the meaning of the contract term, they would be irrelevant even for the purpose of assisting the arbitrator in interpreting the contractual wage increase term. And, if the arbitrator decides that the notes are irrelevant, that decision would avoid the unnecessary disclosure of confidential information. On the other hand, the arbitrator may think the notes may be relevant and order disclosure or an in camera inspection. If the Union refuses to turn over relevant portions of the Union's bargaining notes, the Employer may then argue that the arbitrator should draw an adverse inference from the Union's failure to provide relevant evidence. In sum, the Employer has already placed the contract language dispute before an arbitrator who is well suited to also determine the helpfulness of this requested information.

We also conclude that the Union validly contends that its bargaining notes are confidential because they may contain the Union's bargaining strategy. The interests of collective-bargaining are furthered by the parties' confidence that their good-faith bargaining strategies can be formulated without fear of exposure.[9] Thus the Employer's request for the Union's bargaining notes raises serious questions of confidentiality that may well interfere with the collective bargaining process.[10]

In sum, the bargaining notes are not relevant to grievance processing and/or arbitration, the Employer is not

---

[9] See Berbiglia, Inc., 233 NLRB 1476, 1495 (1977) (Board approves ALJD ruling revoking subpoena seeking union records of membership meetings containing material regarding pending negotiations; ALJ determined that the union's interest in the confidentiality of its bargaining strategy outweighed the employer's interest in conducting a fishing expedition into the union's meeting notes).

[10] We recognize that a party refusing to furnish information on confidentiality grounds typically has a duty to bargain in an effort to accommodate the other party. However, given the lack of relevance of this material, which is not being sought for a statutory purpose but rather to bolster the Employer's litigation strategy where the parties had already agreed to arbitrate the dispute, and the risk of harm to the collective-bargaining process that is entailed in compelling disclosure of bargaining notes, we find that the Union here has no duty to bargain an accommodation.

seeking the notes for the statutory purpose of contract administration, and the Employer's request also raises serious confidentiality concerns. Accordingly, the instant charge should be dismissed, absent withdrawal.

B.J.K.